

**EMERGENCY Chapter NR 1**  
(excerpts)

**NATURAL RESOURCES BOARD POLICIES**

**NR 1.016 Department responsibilities to conserve and enhance public waters. (1)** The Natural Resources Board recognizes that the state of Wisconsin has an affirmative duty, under the public trust doctrine, which emanates from Article IX, Section I, of the Wisconsin Constitution, to protect and preserve the state's waters, which are one of Wisconsin's most important natural resources. The Wisconsin Supreme Court has admonished that, at the time of statehood, the state of Wisconsin "became a trustee of the people charged with the faithful execution of the trust created for their benefit." The Court further noted that the "wisdom of the policy which... carefully preserved to the people the full and free use of waters cannot be questioned, nor should it be limited by narrow construction." (*Diana Shooting Club v. Husting*, 156 Wis. 261(1914). The Wisconsin courts have noted that the state of Wisconsin must take into account the "potential ecological impacts" of projects in our navigable waters to carry out its "assigned duty as protector of the overall public trust in maintaining one of Wisconsin's most important natural resources. (See *Sterlingworth v. DNR*, 205 Wis. 2d 710(Ct. App.1996))

(2) In addition to the common law provisions requiring the state of Wisconsin to protect the ecology of our public trust waters, scientific research has demonstrated that the impacts of human manipulation of our shorelines and in water habitat are having significant impacts on our vital aquatic ecosystems. The department of natural resources participated actively in collaborative efforts with interest group leaders and scientists from across the state of Wisconsin to assess the status of Wisconsin's water resources during 2003 – The Year of Water. This collaborative effort resulted in a report of the Wisconsin Academy of Sciences, Arts and Letters entitled, "*Waters of Wisconsin: The Future of our Aquatic Ecosystems and Resources*". This report noted the critical importance of maintaining our lakes, rivers and streams, wetlands, and aquatic ecosystems and the biodiversity of our state's waters. (*Waters of WI* at pps. 12-20) It recognized that all actions affecting our waters have consequences and that these consequences accumulate over time, and, cumulatively, cannot be ignored. (*Waters of WI* at p. 63.) The report adopted a "Statement of Principles" that noted "the citizens of Wisconsin increasingly appreciate that the degradation of water bodies and watersheds, loss of aquatic biodiversity, and varied forms of water pollution pose serious threats to human health, the quality of life, a thriving economy, and vital aquatic ecosystems." The report noted that Wisconsin's "bounty of freshwater and the variety of its aquatic ecosystems are assets of global significance", which face diverse challenges to their integrity....". It was noted that "sustainability" of these resources "implies a commitment to protecting, managing, restoring, and using Wisconsin's waters in a manner that ensures the health of our aquatic ecosystems while securing their cultural, economic and public health benefits for future generations." (*Waters of WI* at pps. 92-93) The report noted "Management of Wisconsin's waters should strive to protect and where possible restore natural hydrologic functions, native biological diversity, and ecological integrity. (*Waters of WI* at p. 96). The conclusions and recommendations of the Waters of Wisconsin report are consistent with state and national research assessing the impacts of physical activities on our aquatic ecosystems.

Note: For a full copy of the Waters of Wisconsin Report, contact the Wisconsin Academy of Sciences, Arts and Letters, 1922 University Avenue, Madison, WI or go to their website at [www.wisconsinacademy.org](http://www.wisconsinacademy.org). For a survey of other research supporting the need to protect, see "The Construction, Aesthetics and Effects of Lakeshore Development: A Literature Review, by Sandy Engel and Jerry L. Pederson, Jr., Wisconsin Department of Natural Resources Research Report 177, December 1998.

(3) Recognizing that the legislature has delegated to the department of natural resources the authority to administer its surface water management programs, the Natural Resources Board directs the department to administer those programs in a manner consistent with its delegated authority under the statutes, the rules which it has promulgated, the common law public trust principles and the science relating to the management of our aquatic resources in order to assure the sustainability of our aquatic ecosystems.

(4) The Natural Resources Board recognizes that conservation of the extent and quality of public waters and the remaining aquatic habitat and natural features is critical to the future of hunting, fishing, recreation, tourism, economic development and the quality of life in Wisconsin.

(5) Recent legislative actions have modified and streamlined the regulatory processes under ch. 30, Stats., which is the primary mechanism for ensuring that physical alterations do not diminish the extent or nature of public rights in navigable waters. During the course of the deliberations in the adoption of these statutory modifications, the bill sponsors clearly stated their intent to provide exemptions for “very minor activities” and not to diminish the public trust protections of Wisconsin’s waters. The bill’s sponsors noted that, “Under the [Act], the DNR is **required** to consider public rights or interest when promulgating rules regarding the issuance of statewide general permits.” The expressed intent of the Legislature, and of the Governor, was to “uphold the highest environmental standards.”

(6) As trustee of public waters, the department shall conserve and enhance public rights established under the laws of this state in our navigable waters. These public rights include, but are not limited to, the right to navigate, hunt, fish, swim, recreate, enjoy natural scenic beauty in clean water free of environmental pollution, and other rights as may be established by law in the future.

**NR 1.05 Identification of areas of special natural resource interest.** (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate by rule areas of special natural resources interest as defined in s. 30.01(1am), Stats.

(2) Exemptions listed in ss. 30.12(1g)(a) to (km) and 30.20(1g)(b)1. and 2., Stats., do not apply in areas of special natural resource interest. General or individual permits are required.

Note: Activities not exempted in areas of special natural resource interest are deposits less than 2 cubic yards; seasonal structures other than piers or wharves; fish habitat structures; bird nesting platforms; boat shelters, hoists and lifts; piers or wharves meeting dimensional standards; dry hydrants; pilings; riprap repair or replacement; biological shore erosion control structures; intake or outfall structures; dredging to place or maintain an exempt structure; dredging without auxiliary power.

(3) Waters that can serve as benchmarks for assessing and guiding the conservation and management of all public waters shall be identified as possessing significant scientific value under s. 30.01(1am)(c), Stats. In identifying the waters, the department shall consider the presence of self-sustaining populations of native plants and animals, unique natural features, remnant areas of native biota, and water uses of statewide significance including research or education.

(4) The following waters are hereby determined to be areas of special natural resources interest as defined in s. 30.01(1am), Stats:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29, Stats.
- (b) A surface water identified as a trout stream by the department under s. NR 1.02(7).
- (c) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.
- (d) Waters inhabited by any endangered, threatened, special concern species or unique ecological communities identified in the Natural Heritage Inventory.
- (e) Wild rice waters as identified by the department and the Great Lakes Indian Fish and Wildlife Commission.

(f) Tributaries to and rivers connecting to inland lakes containing naturally-reproducing populations of sturgeon up to the first dam.

(g) Navigable waters having self-sustaining populations of walleye located in the ceded territory of the state where resource allocation rights are shared by sovereign tribes.

(h) Muskellunge waters of the state where the muskellunge population is entirely or partially sustained through natural reproduction (Category 0, Category 1 and Category 2 muskellunge waters).

(i) Waters in areas identified in a special area management plan (SAMP) or special wetland inventory study (SWIS) under s. NR 103.04.

Note: Special area management plans exist for the City of Superior, Douglas County and Chiwaukee Prairie, Kenosha County. A Special Wetland Inventory Study exists for the area bordering the bay of Green Bay.

(j) Waters in ecologically significant coastal wetlands along Lakes Michigan and Superior as identified in the Coastal Wetlands of Wisconsin (DNR-CMP project).

(k) Federal or state, under ss. 30.26 and 30.27, designated wild or scenic rivers.

(L) Perennial tributaries to surface waters identified as trout streams by the department under s. NR 1.02(7).

**(5)** The department shall maintain on its website and make available at its offices a consolidated list of areas of special natural resource interest along with all other waters designated under ss. NR 1.06 and 1.07 so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at [www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml](http://www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml).

SECTION 3. NR 1.06 is created to read:

**NR 1.06 Identification of public rights features. (1)** To fulfill its affirmative duty to protect public trust waters, the department shall continually assess the state's public trust waters to identify locations of public rights features that require general or individual permit review in lieu of exemptions, or reasonable limitations on location to assure that the public's rights and interests under the public trust doctrine are protected, under ss. 30.12(1p)3. and (2m), 30.123(6m) and (6s), 30.20(1k)2. and (1m), 30.206(1c) and (3)(3r), Stats.

**(2)** Due to the potential significant adverse impacts of the activity on public rights features, exemptions listed in ss. 30.12(1g)(b) or (f), 30.123(6)(e) and 30.20(1g)(b)2., Stats., in locations where there are public rights features, except for piers and wharves as specifically provided in s. NR 326.08(1)(d). General or individual permits are required for those activities in locations of public rights features.

Note: Exemptions not allowed in locations of public rights features are: seasonal structures other than piers or wharves; piers or wharves meeting dimensional standards in s. 30.12(1g)(f), Stats., but not meeting standards under s. NR 326.08(1)(d), replacement culverts with inside diameter not more than 24 inches; dredging without auxiliary power.

**(3)** For those activities that may not be located where there are public rights features as defined in s. NR 1.06, a person may undertake an exempt activity after they have evaluated the site and determined that no public rights features as described under s. NR 1.06(4) may be affected by their activity.

**(4)** Public rights features include:

(a) Fish and wildlife habitat, including but not limited to spawning, nursery and feeding areas.

Note: Physical features constituting fish and wildlife habitat include stands of aquatic plants; riffles and pools in streams; undercut banks with overhanging vegetation or that are vegetated above; areas of lake or streambed where fish nests are visible; large woody cover.

(b) Physical features of lakes and streams that ensure protection of water quality.

Note: Physical features that protect water quality include stands of aquatic plants (that protect against erosion and so minimize sedimentation), natural streambed features such as riffles or boulders (that cause turbulent stream flow and so provide aeration).

(c) Reaches of bank, shore or bed that are predominantly natural in appearance (not man-made or artificial) or that screen man-made or artificial features.

Note: Such reaches include those with stands of vegetation that include intermixed trees, shrubs and grasses; stands of mature pines or other conifer species; bog fringe; bluffs rising from the water's edge; beds of emergent plants such as wild rice, wild celery, reeds, arrowhead.

(d) Navigation thoroughfares or areas traditionally used for navigation during recreational boating, angling, hunting or enjoyment of natural scenic beauty.

Note: Physical features indicative of navigation thoroughfares include shallow water areas typically used by wading anglers or areas frequently occupied by regularly repeated public uses such as water shows.

**(5)** The department shall base its identification of public rights features on factual information obtained from reputable sources, including but not limited to:

(a) Field surveys and inspections, including historical surveys for fish, wildlife, rare species, aquatic plants, geologic features or water quality.

(b) Surveys or plans from federal, state or local agencies.

(c) Factual documentation of features or use patterns from property owners, user groups or knowledgeable users on the waterbody.

**(6)** Procedure for identifying public rights features.

(a) After determining the locations of public rights features, the department shall give notice in the official state newspaper or other media the department selects in the area affected which is likely to inform the local residents.

(b) The department shall notify the county clerk of any county bordering the lake or reach of a stream and legislators whose districts include the affected public waters and the chairpersons of the committees of the legislature with jurisdiction for natural resources issues.

(c) The notice shall contain the location and description of the public rights features and the basis for its determination that the location contains public rights features. If a hearing is not requested in writing within 30 days after the mailing of the notice, the department may waive the hearing. Upon receipt of a request for a hearing, the department shall, not less than 10 days before the hearing, mail written notice thereof to each person notified under par. (a) or other media the department selects in the area affected which is likely to inform the local residents.

(d) At each hearing, the department shall take evidence offered by persons in support of or in opposition to the determination. If the department finds any location not properly classified, the location may not be identified as the location containing public rights features.

**(7)** Areas of special natural resource interest as determined in this chapter are determined to be locations of public rights features.

(8) The following locations are determined to contain public rights features:

(a) Sensitive areas designated under ch. NR 107.

(b) Lakes and streams specifically named in the Wisconsin Land Legacy Report, publication number LF-001-2004.

(9) The department shall maintain on its website and make available at its offices a consolidated list of waters with identified public rights features along with all other waters designated under s. NR 1.07 along with a visual guide to identification of public rights features to assist a person the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at [www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml](http://www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml).

**NR 1.07 Identification of priority navigable waterways.** (1) To fulfill its affirmative duty to protect public trust waters, the department shall designate priority navigable waterways as defined in s. 30.19(1b)(c), Stats.

(2) Rules promulgated under s. 30.19(1d), Stats., shall apply to priority navigable waterways.

(3) The following waters are hereby determined to be priority navigable waterways:

(a) All areas of special natural resources interested as defined in s. NR 1.05.

(b) Lakes less than 50 acres in size.

(c) All locations containing public rights features as defined in s. NR 1.06.

(4) The department shall maintain on its website and make available at its offices a consolidated list of priority navigable waters so that a person may readily determine the applicability of all exemptions or permit requirements under ch. 30, Stats.

Note: See the department's website at [www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml](http://www.dnr.state.wi.us/org/water/fhp/waterway/index.shtml).